U.S. Department of Labor

Office of Administrative Law Judges
Suite 405
2600 Mt. Ephraim Avenue
Camden, NJ 08104

(856) 757-5312
(856) -757-5403 (FAX)

Issue date: 06Dec2000

CASE NO.: 1999-LHC-02666

OWCP NO.: 01-143788

In the Matter of

WILLIAM T. MORRISSEY, III
Claimant

v.

KIEWIT-ATKINSON-KENNY
Employer

and

ST. PAUL FIRE & MARINE INSURANCE COMPANY
Carrier

Appearances:

Thomas J. Freedman, Esquire, Boston, Massachusetts, for the Claimant

Donald W. Wallace, Esquire, Quincy, Massachusetts, for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

I. Statement of the Case

This proceeding arises from a claim filed on February 16, 1999 by William T. Morrissey, III (the "Claimant") against Kiewit-Atkinson-Kenny (the Employer) under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq*. (the "Act" or "LHWCA"). A hearing was conducted before me in Boston, Massachusetts on March 3, 2000, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made on behalf of the Employer and its workers' compensation insurer, the St. Paul Fire & Marine Insurance Company (the Carrier). At the hearing, testimony was heard from the Claimant and from three additional witnesses – the Claimant's attorney, Thomas Freedman, and two witnesses called by the Employer, Ms. Jeannine Gaudet, a vocational consultant, and Mr. Paul Zick, an employee of the Kiewit Construction Company. Documentary evidence was admitted as exhibits ALJX 1 through 6, CX 1 through 70, and EX A-1 through A-8, B-1 through B-3, C-1 through C-9, D-1, and EX 2.[1] At the close of the hearing, I allowed the Claimant a period of two weeks in which to offer any additional evidence and to request leave to submit the deposition testimony of any additional witnesses. I also granted the parties' request that the record be held open for the submission of written closing argument, the date for such submission to be set by agreement of the parties upon their receipt of the hearing transcript. TR 328-330. Post-hearing, the Claimant offered three additional exhibits: CX 70 - a Boston Globe article concerning construction of the Boston Harbor sewage plant and outfall tunnel; CX 71 - a Boston Globe article concerning the role of Federal District Judge A. David Mazzone in the Boston Harbor sewage plant and outfall construction project; and CX 72 - hospital records dated March 28, 2000. By order issued on April 25, 2000, I admitted Claimant's Exhibits CX 70 and 71, but I sustained the Employer's objection to CX 71 on relevancy grounds. On June 23, 2000, I granted the parties joint motion for an enlargement of time to submit closing argument, and both parties timely filed post-hearing briefs on July 7, 2000. The record was then closed.

After careful analysis of the evidence contained in the record and the arguments submitted by the parties, I have concluded that the claim for compensation filed in this matter must be denied as not covered by the Act. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At the hearing, the parties offered the following stipulations (JTX1) which I now adopt as

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[1] The following references will be used in this decision: "ALJX" for an exhibit offered by this Administrative Law Judge; "JTX" for an exhibit offered jointly by the parties; "CX" for a Claimant's exhibit; and "EX" for exhibits offered by the Employer and Carrier. "TR" will be used to refer to the official hearing transcript.

findings:

1. The Claimant sustained an injury arising out of and in the course of his employment on October 11, 1994 resulting in personal injuries to his low back. Thereafter the Claimant developed problems with his right hip which the Employer/Carrier also accepted as being related to the injury of October 11, 1994.

2. The injury involving the low back and right hip occurred in the course and scope of the Claimant's employment.

3. An employer/employee relationship existed between the parties at the time of the injury on October 11, 1994.

4. The Employer was notified of the Claimant's injury on or about October 11, 1994.

5. The Claimant notified the Employer of his claimed inability to work as of November 5, 1994.

6. The parties are unable to agree as to what average weekly wage would be applicable to the Claimant's claim under the provisions of the Longshore and Harbor Workers' Compensation Act. The following alternatives are submitted for consideration:

A. The average weekly wage determined' by the State Department Industrial Accidents and proffered as applicable by the Claimant's representative (supported in part by Claimant's Exhibit 1) as $1,374.25; or

B. The Employer/Carrier is recommending use of the weekly wage of $1,030.69 which it argues is the applicable rate utilizing the provisions of 33 U.S.C. §910(d)(1) as being "one fifty-second part" of the Claimant's average annual earnings as reflected in Employer/Carrier's Exhibit A8.

7. The Employer filed a First Report of Injury on a Massachusetts Department of Industrial Accidents (DIA) Form 101 with the State Department of Industrial Accidents on November 17, 1994.

8. Pursuant to the provisions of Massachusetts General Laws, Chapter 152, §8 the Carrier paid benefits for a period exceeding 180-days after the onset of disability and thereafter, by operation of law, accepted liability for the Claimant's low back injuries.

9. The Carrier paid to the Claimant benefits for temporary total disability pursuant to General Laws, Chapter 152, §34 for the maximum period of entitlement under said statute namely 156 weeks for the period encompassing November 9, 1994 through November 8, 1997 at the weekly rate of $585.66 per week (the maximum applicable compensation rate pursuant to G.L. Ch. 152).

10. After expiration of benefits for temporary total disability under the Commonwealth of Massachusetts Compensation Act the Claimant filed an employee's claim on a Massachusetts DIA Form 110 seeking entitlement to benefits for permanent and total disability claiming entitlement pursuant to General Laws, Chapter 152, 934A with a claim dated October 16, 1997. This claim was heard at a conference before Honorable William F. Long, Jr., an administrative judge, for the Department of Industrial Accidents on February 26, 1998. Following this conference Judge Long issued an order of payment requiring the Carrier to pay benefits for permanent and total disability of the Massachusetts Workers' Compensation Act again at a weekly rate of $585.66 from November 9, 1997 to that date and continuing plus medical benefits. Said order was initially appealed by the Carrier on March 11, 1998, however, subsequently on September 14, 1998 the carrier withdrew its appeal in effect permitting the order of payment of Judge Long to continue in effect.

11. During the initial period of entitlement for permanent and total disability benefits under the Massachusetts State Workers' Compensation Act, Chapter 152, the Carrier paid benefits at the weekly rate of $585.66 for the period between November 9, 1997 through September 30, 1998. Pursuant to the provisions of General Laws, Chapter 152, §34B a cost of living benefit was calculated and paid effective October 1, 1998 through September 30, 1999 increasing the Claimant's weekly rate of benefits for that period to the weekly sum of $642.12. A further cost of living adjustment benefit pursuant to General Laws, Chapter 152, §34B was calculated as of October 1, 1999 which has been paid from that point to the present resulting in a weekly sum of $715.65 constituting the adjusted benefit rate payable under the Massachusetts State Workers' Compensation Act.

12. The Carrier initially accepted the Claimant's claim for benefits relating to the low back under the Massachusetts State Workers' Compensation Act, however, initially contested payment of benefits for the right hip injury as claimed by the Claimant. This contest of benefits resulted in a further claim for compensation (Mass. DIA Form 110) being filed by the Claimant on or about September 17, 1998 and September 28, 1998. These claims resulted in a conference proceeding being held on February 24, 1999 again before Honorable William F. Long, Jr., an administrative law judge, for the State Department of Industrial Accidents. This conference resulted in an order of payment filed by Judge Long on March 15, 1999 requiring the Carrier to pay medical benefits pursuant to the provisions of Massachusetts General Laws, Chapter 152, §13/30 and "more particularly past unpaid bills and hip replacement medical expenses" finding said bills to be causally related, reasonable and necessary. Although the Carrier initially contested this order and filed an appeal on March 18, 1999, the Carrier thereafter by filing dated November 8, 1999 withdrew its appeal to this order thus allowing for this order to remain in full force and effect.

13. The Carrier has not accepted as compensable any claims made by the Claimant under the provisions of Massachusetts General Laws, Chapter 152 nor under the Longshore and Harbor Workers, Compensation Act for any other medical conditions claimed by the Claimant including but not limited to claims that he has a psychiatric impairment allegedly causally related to his employment. The Carrier maintains its denial of any and all conditions other than the low back and right hip.

14. The Claimant, through counsel, filed a claim for compensation under the Longshore and Harbor Workers, Compensation Act dated February 16, 1999. Following this, the Carrier was notified of the claim and filed a notice of controversion, form LS-207 dated March 19, 1999. No voluntary payments were made by the Carrier with respect to the Claimant's claim. Thereafter, an informal conference was conducted on June 8, 1999. Following receipt of a recommendation, a request for a formal hearing was filed.

15. No benefits have been paid by the Employer/Carrier under the Longshore and Harbor Workers' Compensation Act.

16. The national average weekly wage (maximum compensation rate) applicable under the Longshore and Harbor Workers' Compensation Act as of the Claimant's date of injury is $760.90.

17. On or about January 20, 1995, the Claimant underwent surgery at the Brigham & Women's Hospital consisting of a laminectomy at the L5-S1 level as well as an exploration of the L4-5 disc levels.

18. On or about April 7, 1997, the Claimant underwent a further surgical procedure again at the Brigham & Women's Hospital consisting of a laminectomy at the L4-5 level with a fusion of L4-5 and L5-S1 including the installation of BAK titanium cages.

19. On or about June 1, 1998, the Claimant underwent a third surgical procedure to the low back involving a re-exploration of the L4-5 and L5-S1 levels with foraminotomies at these levels with the installation of pedicle screws with internal fixation utilizing rods and pedicle screws. This procedure included bone grafting.

20. On or about October 16, 1998, the Claimant underwent a right total hip replacement procedure (arthroplasty).

21. The Claimant has indicated his desire to undergo additional surgery including a revision of his right hip arthroplasty and removal of pedicle screws and rods in or about March 2000.

The parties further stipulated that the issues presented for adjudication are:

1. Whether or not the claim comes within the provisions of the Longshore and Harbor Workers' Compensation Act (including a determination of whether the Claimant meets the status and situs tests)?

2. What medical conditions are to be found causally related to the Claimant's stated injury of October 11, 1994 (noting that the Carrier has accepted responsibility for low back and right hip difficulties but has denied other medical conditions as being related)?

3. What is the nature and the extent of the Claimant's disability, and has the Claimant achieved a point of maximum medical improvement?

4. What is the average weekly wage applicable to an award of benefit under the Longshore Act applicable to this case?

5. If benefits are awarded under the Longshore and Harbor Workers' Compensation Act how do the provisions of 33 U.S.C. §903(e) apply with respect to payments previously made under the State Workers' Compensation Act for all categories of benefits?

6. Has the Claimant filed a timely claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §913?

7. Is the Carrier responsible for payments for medical services for all treatment received by the employee pursuant to 33 U.S.C. §907?

III. Summary of the Evidence Relevant to Coverage under the Act[2]

The Claimant testified that he is married and that he currently lives in Bourne, Massachusetts with his wife and three dependent children. He is a high school graduate and attended two semesters of college, one semester at the University of Miami and one semester at Boston State College. He has no college degrees and began employment in approximately 1979. TR 49-50. The Claimant's work experience is primarily in the residential and commercial construction industries, although he also has some work experience as a bartender. He is a member of Local 88 of the Tunnel Workers' Union, and he holds a construction superintendent's license as well as a hoister's license which is required to operate certain machinery used in tunnel boring work. TR 51-53.

The Claimant further testified that he began his employment with the Employer in 1991 and worked on two projects, the North Systems Tunnel Project and the Outfall Tunnel Project, both of which are located on Deer Island in Boston Harbor. TR 53-54. Both projects are part of a major construction project, known as the Harbor Clean-up Project on Deer Island, undertaken by the Massachusetts Water Resources Authority (MWRA), a state agency, to build a new sewage treatment plant and discharge or outfall tunnel to serve the Boston metropolitan area. The Employer, which is a joint venture composed of the Kiewit Construction Company, the Guy F. Atkinson Construction

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[2] The summary of the evidence is limited to the testimony and other evidence bearing on the threshold issue of whether the instant claim is covered by the Act. The record also contains a substantial body of evidence relating to the Claimant's injury and subsequent medical treatment as well as the testimony of a vocational expert called by the Employer to establish the existence of suitable alternative employment.

Company and the Kenny Construction Company, is the MWRA's general contractor on this project. *See Kiewit Construction Company v. Westchester Fire Insurance Company*, 878 F.Supp. 298 (D. Mass. 1995). Under its contract with the MWRA, the Employer was hired to create an effluent outfall tunnel running from Deer Island into the Atlantic Ocean. *See Sleeper v. ICF Kaiser Engineers Massachusetts, Inc*., 2 Mass.L.Rptr. 311, 1994 WL 879511 (Mass.Super. 1994).

To explain the nature of the project, the Claimant introduced a video tape of a report broadcast in 1992 by WBZ TV, a Boston television station. CX 63.[3] According to the television report, the outfall tunnel being constructed as part of the sewage treatment project is located more than 400 feet underground beneath the ocean floor and would extend a total of nine and one-half miles into the Atlantic Ocean. TR 62-63. The television reporter described the outfall tunnel project as "a modern-day mining operation with crews working around the clock with a laser-guided tunnel boring machine moving through solid rock which geologists say is over 400 million years old." TR 65-66. As depicted in the television report, the tunnel boring machine was used to drill into the bedrock to form the outfall tunnel, discharging rock debris which was then loaded onto rail cars for removal from the tunnel.

The Claimant testified that he was hired to work in the outfall tunnel as a member of a "bull gang." TR 55. His position was variously referred to as a "sandhog" or "miner". The Claimant's job duties included maintenance of the rail system, water systems and the tunnel boring machine. In addition, he was required on a daily basis to shovel muck, a substance he described as cement-like mixture of wet dirt and debris, onto a conveyor belt system in order to keep the muck level down so that the rail system could move effectively through the tunnel. TR 55-57. The Claimant's work also involved assisting with the changing of heads or blades, which weigh between 275 and 800 pounds, on the tunnel boring machine and setting pieces of concrete which formed the tunnel's interior. TR 73-74, 147-148.

The Claimant further testified that he obtained access to the work site on Deer Island by taking a ferry; however, he did not perform any work while on the ferry. TR 140. Upon arrival at Deer Island, the Claimant took an elevator/hoist 420 feet down below the surface of the island to the bottom of a shaft where he would be transported by the rail system to the area where work was being done. TR 60, 144. The Claimant testified that this shaft leading to the tunnel was located approximately 200 to 300 feet away from the island's shoreline. TR 141-142.

On October 11, 1994, the date of the injury which give rise to his claim under the Act, the Claimant was working in the outfall tunnel shoveling muck when he felt pain in his low back and leg. TR 77. He testified that the location in the tunnel where he sustained this injury was approximately six and one half miles east of Deer Island under the Atlantic Ocean. TR 81.

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[3] The video tape was displayed during the hearing, and the audio portion was recorded in the hearing transcript.

The Employer called Paul Zick, a civil engineer currently employed by the Kiewit Construction Company who had served as the project manager on the outfall tunnel project.
In addition to the tunnel project at Deer Island, Mr. Zick testified that he has worked in tunnel projects in various locations including New York, Texas and Utah. TR 240-245. Mr. Zick testified that the railroad system used in the outfall tunnel was no different from the systems used in any tunnel project, regardless of location, and that there was nothing peculiar about the system to make it a "marine railway" or to distinguish it from any other tunnel railway system. TR 248-249. He further testified that the outfall tunnel itself is approximately 250 to 300 feet under the surface of the ocean floor. TR 249. Mr. Zick testified that workers had two transportation options for traveling to work at Deer Island – by bus from a parking area located at the Suffolk Downs Racetrack in the Winthrop, Massachusetts area or by ferry from the South Shore. TR 250-25l.

Regarding the site of the Claimant's October 11, 1994 injury, Mr. Zick testified that the tunnel extended underneath the ocean floor about five miles east of Deer Island at the time of the Claimant's injury. TR 257-258. He further testified that the area of the ocean floor or rock near where the accident occurred actually rises above the surface of the ocean in a place known as "the Graves". TR 158-259.

Mr. Zick testified that the railroad system used in the outfall tunnel is the same type of railway system used in other tunnel projects regardless of the location and that there was nothing peculiar specific about this railway system which would make it a "marine railway" or different than any other tunnel railway system. TR 251-252. Mr. Zick said that the problems encountered in tunnel construction included different types of rock and soil conditions as well as a common problem with water seepage. TR 244-246. He stated this water generally was attributable to the "groundwater table." TR 246. He also stated that shoveling muck as described by the Claimant was not unique to the outfall tunnel project and was common to tunnel projects he had worked on in Utah, New York and in the "Metro West" area of Boston. TR 246-247. According to Mr. Zick, these conditions are common to tunneling projects whether under the ocean or underground in an inland area. TR 247.

During the period that the Claimant was employed on the outfall tunnel project, Mr. Zick testified that there was a lay-off from approximately June through September 1994 as a result of a fire in one of the tunnels and a determination by the Boston Fire Department which "took control of both tunnels and shut them down." TR 252-253. According to Mr. Zick, the City of Boston and the State of Massachusetts exerted control over the Deer Island tunnel projects. TR 253. Mr. Zick testified that the outfall contract itself was funded by revenue bonds floated by the MWRA and that there was no federal funding. TR 255.

IV. Findings of Fact and Conclusions of Law

The Claimant argues that his claim is covered by the Act based on either a traditional analysis of jurisdiction under the LHWCA or, in the alternative, based on extensions of LHWCA coverage

contained in the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq*., and the Defense Base Act, 42 U.S.C. §1651.

A. Direct Coverage under the LHWCA

Since the enactment of the 1972 amendments to the LHWCA, the question of whether an injured employee's claim for benefits is covered generally requires an inquiry into the situs of the injury (the "situs test") and the status of the injured worker (the "status test"). *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977) (*Caputo*). Section 3(a) of the LHWCA in pertinent part states that "compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. §903(a). And, section 2(3) of the LHWCA defines a covered employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ." 33 U.S.C. §902(3).[4]

The Claimant contends that he satisfies the requirements for coverage in light of Mr. Zick's testimony that the rock into which the tunnel was being drilled actually rises above the surface of the water at or near the point in the tunnel where the Claimant was injured. Based on Mr. Zick's testimony, the Claimant asserts that his injury occurred upon the navigable waters of the Atlantic Ocean and thus is covered by the LHWCA under the reasoning employed by the Supreme Court in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 324 (1983). In that case, a construction worker was injured while performing duties on the deck of a cargo barge being used in the construction of a sewage treatment plant extending into the Hudson River, a navigable waterway. After reviewing the historical development of coverage under the LHWCA and examining the intent of Congress in

[4] Section 2(3) also sets forth the following specific exclusions from coverage, none of which are applicable herein: (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work; (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet; (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance); (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this Act; (E) aquaculture workers; (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length; (G) a master or member of a crew of any vessel; or (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net; if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

enacting the 1972 amendments, the Court concluded,

> In holding that we can find no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon the actual navigable waters in the course of their employment, we emphasize that we in no way hold that Congress meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the maritime employment language. We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in §2(3), and is covered under the LHWCA, providing of course, that he is the employee of a statutory "employer" and is not excluded by any other provision of the Act. We consider these employees to be engaged in maritime employment not simply because they are injured in a historical maritime locale, but because they are required to perform their employment duties upon navigable waters.

Id. at 324.[5] *Cf. Laspragata v. Warren George, Inc*., 21 BRBS 132, 134-35 (1988) (*Laspragata*) (a claimant who was injured while working on the same sewage plant construction project involved in *Perini* was not injured on navigable waters because he was working on a platform permanently affixed to the bedrock of the Hudson River at the time of his injury). Here, the Claimant was not working on a barge, a vessel or any type of apparatus on actual navigable waters when he was injured. Rather, he was shoveling muck in a tunnel bored in bedrock hundreds of feet below the ocean floor. Nor is there any claim in this case that the outfall tunnel is conduit for navigable water or that it is otherwise located in or on a navigable waterway. *Compare Morrison-Knudson Co. v. O'Leary*, 288 F. 2d 542, 543 (9th Cir. 1961) (workers killed while working in a boat located in tunnel constructed to divert the navigable waters of the Snake River during a dam construction project were injured on navigable waters within the meaning of the Act); *C.J. Montag & Sons v. O'Leary*, 304 F.Supp 188 (D.Or. 1969) (worker killed while trying to move a tractor off of a barge located in a "tailrace" which returned water diverted for industrial purposes to the Willamette River, a navigable waterway, was injured on navigable water within the meaning of the Act); *Ransom v. Coast Marine Construction, Inc*., 16 BRBS 69 (1964) (worker injured in a "cofferdam", a water-tight container from which water is temporarily pumped to permit construction, was injured on navigable water because the cofferdam was

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[5] The Court in *Perini* declined to address whether coverage extends to workers injured while transiently or fortuitously on actual navigable waters, noting that its holding only extends to employees "traditionally covered" before the 1972 amendments and reflects a recognition that a worker's performance of his duties upon actual navigable waters is necessarily a very important factor in determining whether he is engaged in "maritime employment" within the meaning of the Act. *Id.* at 324 n.34. *See also Herb's Welding v. Gray*, 470 U.S. 414, 427 n. 13 (1985) (reserving the issue of whether the Act applies to a worker injured while "transiently or fortuitously" on navigable waters but noting that there is a substantial difference between a worker performing a set of tasks requiring the worker to be both on and off navigable waters and a worker whose job is entirely land-based but who takes a boat to work).

located in a navigable portion of the Columbia River, and a permanent withdrawal of water is necessary to defeat federal admiralty jurisdiction). Contrary to the Claimant's imaginative argument, I do not agree that a work site located in solid rock hundreds of feet below any navigable water can reasonably be viewed as being "upon the navigable waters of the United States" as envisioned by Congress simply because the rock rises from the ocean floor to an outcrop which protrudes above the water's surface at a point near the place where the injury occurred. By that logic, any land mass above sea level, or at least any island, could be said to be on navigable waters so that any employee who suffers an injury thereon in the course of their employment would be covered under the Act. Such linguistic and geographic gymnastics distort the plain language of the LHWCA and obliterate any distinction between the land and the sea. As the Supreme Court noted in *Herb's Welding v. Gray*, 470 U.S. 414, 425 (1985), a case where an employee was injured while working on a fixed offshore oil drilling platform, "there will always be a boundary to coverage, and there will always be those who cross it during their employment."[6] In my view, the boundary has not been crossed in this case as there is no meaningful distinction between the platform in *Laspragata* which was located *above* the surface of a navigable waterway and permanently affixed to bedrock and the outfall tunnel which is located *beneath* a navigable waterway and permanently affixed to bedrock. Clearly, neither are located on navigable water. I find, therefore, that the Claimant was not injured "upon the navigable waters of the United States" within the meaning of the LHWCA. This, however, is not the end of the inquiry because the 1972 amendments extended LHWCA coverage to certain locations and classes of employees on the land side of navigable water.

As set forth above, section 2(3) of the LHWCA defines a covered employee as a person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker. The term "maritime employment" is not defined in the Act, but a longshoreman or other person engaged in longshoring operations has been defined as a person engaged in activity that is an integral or essential part of loading or unloading a vessel. *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 47 (1989) (holding that workers who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act even though they were not performing work essential to the loading process when they were actually injured). The term "harbor worker" has been defined to include persons directly involved in the construction, repair, alteration or maintenance of harbor facilities which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships. *Hurston v. McGray Const. Co.*, 29 BRBS 127 (1995), *on remand from Hurston v. Director, OWCP*, 989 F.2d 1547 (9th Cir. 1993). The Supreme Court has emphasized that a status determination under section 2(3) properly focuses on the injured employee's occupation rather than the particular duties being performed at the time of injury. *Caputo*, 432 U.S. at 273 (section 2(3) covers "persons whose employment was such that they spent at least some of their

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[6] In *Herb's Welding*, no claim was made that a fixed offshore oil-drilling platform is "on navigable waters." *Id*. at 424 n. 10.

time in indisputably longshore operations and who, without the 1972 amendments, would be covered for only part of their activity"); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 78 (1979) (section 2(3) contains occupational not geographic requirements). Pursuant to this guidance, the First Circuit, in which this matter arises, looks to "the actual nature of [the employee's] regularly assigned duties as a whole." *Levins v. Benefits Review Bd., U.S. Dept. of Labor*, 724 F.2d 4, 7 (1984), quoting *Stockman v. John T. Clark & Sons of Boston, Inc*., 539 F.2d 264, 275 (1976), *cert. denied*, 433 U.S. 908 (1976). If a regular portion of the employee's overall tasks (*i.e*., more than "momentary or episodic" or "discretionary or extraordinary occurrences") are related to the "indisputably maritime activities"of loading and unloading ships, transporting cargo and repairing or building equipment, the employee has covered status. *Levins* at 8-9. The Claimant's regularly assigned duties consisted of various activities which assisted in the process of boring a tunnel designed to transport sewage through solid rock. His work in the outfall tunnel had no connection to loading and unloading of ships, transportation of cargo, repairing or building maritime equipment, or the repair, alteration or maintenance of harbor facilities. Simply put, there is nothing even remotely maritime in the nature of the Claimant's work. Indeed, the record shows that the Claimant's job duties would have been the same had the outfall tunnel been constructed in bedrock below the surface of the land instead of the ocean floor. Since the Claimant has not demonstrated that his employment duties as a tunnel sand hog or miner had any relationship to indisputably maritime activities, I find that the Claimant has not established that he was engaged in maritime employment within the meaning of section 2(3). Therefore, he has not satisfied the status test.

Assuming that the Claimant had established maritime status, he would also have to pass the situs test under section 3(a) of the LHWCA which, as discussed above, defines a covered situs as being located on the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. Coverage of a situs under section 3(a) thus depends on the nature of the place of work at the moment of injury. *Melerine v. Harbor Construction Co.*, 26 BRBS 97, 100 (1992); *Alford v. MP Industries of Florida*, 16 BRBS 261, 263 (1984). The sewage outfall tunnel where the Claimant was injured clearly was not an adjoining pier, wharf, dry dock, terminal, building way or marine railway. Moreover, in the absence of any evidence that the tunnel was used by the Employer for maritime activities at the time of the injury, I find that the tunnel can not be viewed as an other adjoining area customarily used in the loading, unloading, repairing, dismantling or building of a vessel. *See Nelson v. Guy F. Atkinson Construction Co.*, 29 BRBS 39, 41-42 (1995) (claimant failed to satisfy the situs requirement where, at the time of his injury, he was preparing and excavating, through the use of explosives, an area of dry land that would eventually become a navigational lock), *aff'd sub nom Nelson v. Director, OWCP*, 101 F.3d 706 (Table) (9th Cir. 1996). *See also Rizzi v. Underwater Construction Corp*., 84 F.3d 199, 203 (6th Cir. 1996) (diver who was injured in an underground reservoir tank under a paper mill failed the situs test as required under section 3(a) as the tank did not constitute "navigable waters" pursuant to the section; it is irrelevant to a determination of navigability that water rushed in and out of tank and that claimant was subject to "maritime hazards"; nor did the tank constitute an "adjoining area" as there was

no evidence to suggest that it was "used to load, unload, repair, dismantle, or build a vessel."). Accordingly, I conclude that the Claimant has not established that his injury occurred on a situs covered by section 3(a) of the LHWCA.

B. Coverage under Extensions to the LHWCA

The Claimant additionally contends that his claim falls within the coverage of the LHWCA by virtue of the extensions enacted by Congress in the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq*., and the Defense Base Act, 42 U.S.C. §1651.

1. Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act, 43 U.S.C. §1333 *et seq*. (the "OCSLA") in pertinent part extends the workers' compensation provisions of the LHWCA to employees who suffer disability or death "as a result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf." 43 U.S.C. §1332(b). The Claimant argues that the location in the outfall tunnel where he was injured falls within the definition of Outer Continental Shelf contained in the OCSLA.[7] However, the OCSLA has been consistently interpreted as requiring that covered operations be related to the types mineral extraction activities described in section 1332(b). *See Mills v. Director, OWCP*, 877 F.2d 356, 359 (5th Cir. 1989) (*en banc*); *Curtis v. Schlumberger Offshore Service, Inc*., 849 F.2d 805(3rd Cir. 1988). *See also Offshore Logistics, Inc. v. Tallentine*, 477 U.S. 207, 220 n.2 (noting that section 1332(b) superimposes a status requirement on the OCSLA's situs requirement; that is, injury or death must result from certain operations on the Outer Continental Shelf). Here, there is no evidence that the Claimant's injury was in any way the result of "operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf." Clearly, the outfall tunnel, which was designed and constructed to carry sewage out to sea, has no relationship to mineral exploration and extraction activities covered by the OCSLA. Consequently, I conclude that the OCSLA provides no basis for extending LHWCA coverage to the claim filed in this matter.

2. Defense Base Act

The Defense Base Act (the "DBA") provides that the LHWCA applies to "the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States

[7] It is noted that the "Outer Continental Shelf" is defined as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. §1331(a).

or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work." 42 U.S.C. §1651. To be compensable under the DBA, "a benefit claim must stem from a contract with the United States to perform public work overseas, public work constituting government-related construction projects, work connected with the national defense, or employment under a service contract supporting either activity." *University of Rochester v. Hartman*, 618 F.2d 170, 176 (2nd Cir. 1980). *See also Airey v. Birdair, Division of Bird & Sons, Inc*., 12 BRBS 405 (1980). The record in this case shows that the Claimant was employed pursuant to a contract between the Employer and the MWRA, a state agency. There has been no showing that any construction work on the outfall tunnel was performed pursuant to a contract with the Federal government. Therefore, the Claimant has offered no evidence which can be construed as establishing that his claim stems from a contract with the United States to perform overseas work. Since the Claimant has not established the requisite connection to a military or United States government construction project, I conclude that his claim is not covered by the DBA. *Hartman*, 618 F.2d at 173-74.

Having determined that the claim is not covered by the LHWCA, either directly or by the OCSLA or DBA extensions, I conclude that benefits must be denied.

V. Order

Based upon the foregoing findings of fact and conclusions of law and upon the entire record, IT IS ORDERED THAT the claim filed by William T. Morrissey, III against Kiewit-Atkinson-Kenny is **DENIED.**

A
DANIEL F. SUTTON
Administrative Law Judge

Camden, New Jersey